No. 212

In the Supreme Court of the United States

OCTOBER TERM, 1960

MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC., AND LARSON HEIGHTS, INC., PETITIONERS

v.

GRANT COUNTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

Statutes and Constitution—Continued

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OPINIONS BELOW

The opinion (oral) of the District Court (R. 266) is unreported. The opinion of the Court of Appeals (R. 341–369) is reported at 276 F. 2d 836.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1960. (R. 369.) A timely petition for rehearing was denied on May 17, 1960. (R. 370.) The petition for writ of certiorari was filed on July 5, 1960, and was granted "limited to Question No. 3" on October 10, 1960, 364 U.S. 814. (R. 370.) The Solicitor General was invited to file a brief setting forth the views

of the United States. (R. 371.) The jurisdiction of this Court rests upon 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

May a state tax which discriminates against persons holding leaseholds from the United States be enforced in a United States court against a deposit of estimated compensation in a condemnation of such leaseholds?

STATUTES INVOLVED

Housing Amendments of 1955, c. 783, 69 Stat. 635:

> SEC. 408 [as amended by Sec. 511, Housing Act of 1956, c. 1029, 70 Stat. 1091]. Notwithstanding the provisions of section 401 of this Act, the provisions of title VIII of the National Housing Act in effect prior to the enactment of the Housing Amendments of 1955 shall continue in full force and effect with respect to all mortgages insured pursuant to a certification by the Secretary of Defense or his designee made on or before June 30, 1955, and a commitment to insure issued on or before June 30, 1956, or pursuant to a certification by the Atomic Energy Commission or its designee made on or before June 30, 1956, except that the maximum dollar amount for each such mortgage shall be $12,500,000. Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII:

Provided, That no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other local services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property: *And provided further,* That the provisions of this section shall not apply to properties leased pursuant to the provisions of section 805 of the National Housing Act as amended on or after August 11, 1955, which properties shall be exempt from State or local taxes or assessments.

(42 U.S.C. 1958 ed., Sec. 1594, note.)

7 Revised Code of Washington:

84.40.030 *Basis of valuation—Criterion of value—Growing crops excluded—Mines, quarries—Leaseholds.* All property shall be assessed at fifty percent of its true and fair value in money. In determining the true and fair value of property, the assessor shall not adopt a lower or different standard of value because it is to serve as a basis of taxation; nor shall

he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, or in the aggregate with all the property in the taxing district; but he shall value each article or description of property by itself, and at such price as he believes it to be fairly worth in money at the time the assessment is made.

The true cash value of property shall be that value at which it would be taken in payment of a just debt from a solvent debtor.

In assessing any tract or lot of real property, the value of the land, exclusive of improvements, shall be determined; also, the value of all improvements and structures thereon, and the aggregate value of the property, including all structures and other improvements, excluding the value of crops growing on cultivated lands and the growing stock of nurserymen.

In valuing any real property on which there is a coal or other mine, or stone or other quarry, the land shall be valued at such price as the land would sell for at a fair, voluntary sale for cash; any improvements thereon shall be separately valued and assessed as above provided; and any personal property connected therewith shall be listed, valued, and assessed separately as other personal property is assessed under general law.

Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. [(i) 1939 c. 206 § 15; 1925 ex. s.c. 130 § 52; RRS § 11135. (ii) 1939 c. 116

§ 1, part; 1925 ex. s.c. 130 § 25; RRS § 11129, part.]

* * * * * * *

84.40.080 *Listing omitted property or improvements.* The assessor, upon his own motion, or upon the application of any taxpayer, shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year, and such valuation shall be stated in a separate line from the valuation of the current year. Where improvements have not been valued and assessed as a part of the real estate upon which the same may be located, as evidenced by the assessment rolls, they may be separately valued and assessed as omitted property under this section: *Provided,* That no such assessment shall be made for any period more than three years preceding the year in which such improvements are valued and assessed: *Provided, further,* That no such assessment shall be made in any case where a bona fide purchaser, encumbrancer, or contract buyer has acquired any interest in said property prior to the time such improvements are assessed. When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest. [1951 1st ex. s.c. 8 § 1; 1925 ex. s.c. 130 § 59; formerly RRS § 11142.]

STATEMENT

This action was instituted by the United States for the condemnation of certain leasehold interests and easements held by the petitioners. (R. 3–25.) The United States deposited in the District Court the amount of $253,000 as estimated compensation under a declaration of taking filed March 1, 1958 (R. 152), which sum was allocated among the three petitioners as follows: Moses Lake, $126,500; Larsonaire, $65,300; Larson Heights, $61,200. (R. 344.) The respondent, Grant County, Washington, petitioned the court for an order directing that virtually all of the deposited amount should be distributed to it in satisfaction of tax liens it held on the condemned property for the years 1955 through 1959.[1] (R. 83–87.) The District Court disallowed the county's claims except for those against Moses Lake for the years 1955 and 1956. (R. 158.) Appeals and cross-appeals were taken pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (R. 342.) The Court of Appeals reversed in part and affirmed in part. (R. 369.) The relevant facts may be summarized as follows:

Moses Lake, Larsonaire, and Larson Heights, petitioners herein, were sponsors of Wherry Act housing projects on Larson Air Force Base pursuant to leases executed by the Secretary of the Air Force under

[1] The county's claims against petitioners' interests were as follows: Moses Lake, $142,285.73, Larsonaire, $68,838, Larson Heights, $47,088. (R. 345.) Thus, the county's claims against Moses Lake and Larsonaire were greater than the amount deposited for them by the United States. Had the county been successful in its petition, it would have received all but $14,112 of the deposited sum.

Title VIII of the National Housing Act (12 U.S.C. 1958 ed., Sec. 1748). (R. 152.)

As sponsors, they entered into separate leases with the United States pursuant to Sections 801 to 809 of Title VIII of the National Housing Act (12 U.S.C. 1958 ed., Secs. 1748, 1748a to h-1). The Moses Lake lease was entered into on May 31, 1950, the Larsonaire lease on August 6, 1953, and the Larson Heights lease on August 2, 1954. (R. 342.)

By the terms of each lease, the respective lessees were to erect, maintain, and operate on the military reservation a housing project for a period of seventy-five years unless sooner terminated by the Government. The projects were financed by F.H.A. insured loans. The housing units were to be leased to military and civilian personnel assigned by the military commander.

Under the terms of these leases the buildings and improvements as completed became real estate and property of the United States. Upon expiration of the leases or their earlier termination, all such improvements were to remain the property of the Government without further compensation. After the completion of the buildings and improvements, and until March 1, 1958, the respective sponsors operated the rental housing projects in the manner contemplated by the leases. (R. 342–343.)

In order to build the projects, the lessees obtained F.H.A. insured loans in the amount of more than $6,000,000. (R. 89, 94, 236, 287.) Those loans were

secured by mortgages on the leasehold interests of the petitioners. (R. 236.)

Larson Air Force Base is located in Grant County, Washington. In June 1954, the county assessor listed the physical improvements placed upon the Base by Moses Lake in his "Detail and Assessment List" for 1955 taxes. (R. 343.) One month thereafter, in July 1954, the county was restrained by the Superior Court of the State of Washington from levying or attempting to levy taxes against the property of Moses Lake. That injunction remained in effect until December 1957 when the Supreme Court of the State of Washington set it aside and held that the leasehold interest of Moses Lake was taxable at the valuation of the improvements. Immediately after that decision, the county (1) levied on the Wherry Act property of Moses Lake for taxes for the year 1955 pursuant to its previous assessment thereon and (2) assessed and levied upon the property of Moses Lake for the years 1956, 1957, and 1958. (R. 343.) At the same time, it assessed and levied upon the Wherry Act property of Larsonaire for the years 1956, 1957 and 1958, and upon the property of Larson Heights for the years 1957 and 1958. (R. 152–153, 343–344.) Those properties were assessed as omitted property pursuant to Section 84.40.080 of 7 Revised Code of Washington.

Subsequently, the county assessed the properties here involved for taxes for the year 1959.[2] (R. 344.)

[2] The District Court held (R. 158) that, since the taxes for 1959 did not become a lien upon the property prior to their being taken by the Government, the county had no claim therefor. On appeal, the county apparently abandoned its

The District Court disallowed all of the county's claims except those against the interest of Moses Lake for the years 1955 and 1956. (R. 158.) The court held that the county's taxes were invalid because, in violation of Section 511 of the Housing Act of 1956, c. 1029, 70 Stat. 1091,[3] the county had (1) failed to give credit to petitioners for certain amounts determined by the designee of the Secretary of Defense to be equal to payments made by the Federal Government to the local public agencies and expenditures of the Federal Government in providing services for the properties involved which would normally be performed by the State or other local authority, and (2) taxed the properties involved on a basis different from and higher than that employed for taxing similar property. (R. 156–158.) The terms of Section 511 do not apply to taxes for which liens were perfected prior to June 15, 1956. The court found that the 1955 and 1956 taxes would have been assessed and levied against the property of Moses Lake prior to June 15, 1956, had the county not been enjoined from doing so. (R. 155.) The court considered that Moses Lake should not profit from an injunction which had been subsequently dissolved and, therefore, treated the levies[4] for 1955 and 1956 as having been made prior to June 15, 1956. (R. 157.) Accordingly, the

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claim for that year, and, in any event, the Court of Appeals affirmed the District Court on that issue. (R. 364.)

[3] That section amended Section 408 of the Housing Amendments of 1955, c. 783, 69 Stat. 635, *supra*, pp. 2–3.

[4] In the State of Washington, a property tax does not become a lien until the property is levied upon. (R. 350.)

court allowed the county's claim against the interest of Moses Lake for those years. (R. 158.) However, the county officials had not been restrained from assessing the properties of Larsonaire and Larson Heights, and, consequently, the properties of those companies were treated as having been levied upon subsequent to the effective date of the prohibitions contained in Section 511, with the result that the taxes against those properties were void. (R. 158, 365.)

The Court of Appeals affirmed the decision of the District Court as to its allowance of the county's claims for the years 1955 and 1956 against Moses Lake in full. (R. 348.) The court agreed with the reasoning of the District Court on that issue and held additionally that Moses Lake was precluded by the principle of *res judicata* from attacking the validity of the taxes for those years. (R. 348–352, 367–368.)

The court below noted that, but for the injunction against the county, the 1957 taxes for the property of Moses Lake would have been assessed prior to June 15, 1956, and that, under Washington law, an assessment creates an inchoate lien. (R. 352.) The court held that the perfected lien created by the levy against the property related back to the date on which the inchoate lien arose, i.e., the date of assessment. (R. 352.) Accordingly, the county's claim against Moses Lake for the year 1957 was also allowed in full, and the District Court was overruled on that issue. (R. 352–353, 368.)

As to the remaining claims of Grant County,[5] the Court of Appeals affirmed the District Court's determination that the taxes involved violated the prohibitions contained in Section 511. However, the court held that the effect of Section 511 was not to invalidate the entire tax, but required only that the amount collectible be reduced to what it would have been if levied on property other than that held under the Wherry Act. (R. 354.) The court affirmed the District Court's finding that the basis employed by the county in valuing Wherry Act project leaseholds was different from and greater than the basis employed in taxing other leaseholds. However, it remanded the cause for a determination as to the amount of that difference. (R. 354, 368–369.)

SUMMARY OF ARGUMENT

Under the law of Washington as declared by the highest court of that State, leaseholds of federal property are to be valued on a basis different from and higher than that employed in appraising leaseholds of other tax-exempt property. As a result of that difference in treatment, the leaseholds of the petitioners were subjected to a higher tax than would have been the case had their leased property not belonged to the United States. Since there is no justification for that discrimination, it is unconstitutional; accordingly, the taxes levied are void and cannot be collected.

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[5] These involved taxes levied against Moses Lake payable in 1958, against Larsonaire Homes payable in 1956, 1957 and 1958, and against Larson Heights payable in 1957 and 1958. (R. 368.)

If a reassessment of that property is appropriate, it can be performed only by the county officials charged with that duty. The District Court is without jurisdiction to reassess the property and to levy the county tax thereon. The power to assess or reassess the property and levy taxes is within the exclusive province of the county taxing officials. Moreover, as to petitioner Moses Lake for the years 1955, 1956 and 1957, the court below erroneously directed the discriminatory tax to be paid in full.

ARGUMENT

THE WASHINGTON AD VALOREM TAXATION OF WHERRY ACT PROJECTS IS UNCONSTITUTIONAL IN THAT IT UNLAWFULLY DISCRIMINATES AGAINST LESSEES OF THE UNITED STATES

Pursuant to the decision of the Supreme Court of the State of Washington in *Moses Lake Homes* v. *Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069, the respondent assessed and levied taxes against petitioners' interests in the Wherry Act projects on the basis of the full value of the improvements thereon, which belonged to the United States. When imposed by non-discriminatory state law, that manner of taxation in appropriate circumstances is not unconstitutional *per se*. *Offutt Housing Co.* v. *Sarpy County*, 351 U.S. 253. And see *United States* v. *City of Detroit*, 355 U.S. 466; *United States* v. *Township of Muskegon*, 355 U.S. 484. However, the Washington tax is in our view unconstitutional because it is based upon a method of valuation that is different and higher for leaseholds of federal property than it is for leaseholds of other tax-exempt property.

A. THE WASHINGTON AD VALOREM TAX DISCRIMINATES AGAINST LESSEES OF FEDERAL PROPERTY.

Section 84.40.030 of the Revised Code of Washington, pp. 3–4, *supra*, provides that all property shall be assessed at fifty percent of its true and fair value. The section further provides that "Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash." In Washington all leaseholds, including leaseholds of tax-exempt property, are valued on the basis of both their burdens and their benefits. *Metropolitan Building Co.* v. *King County*, 72 Wash. 47, 129 Pac. 883; *In re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473; *Metropolitan Bldg. Co.* v. *King County*, 62 Wash. 409, 113 Pac. 1114. The market value of a leasehold would, of course, depend upon the extent to which it is encumbered. For that reason, in evaluating a leasehold for tax purposes, all burdens such as mortgages on the leasehold must be deducted from its face value. *Ibid.*

The *Metropolitan* cases are particularly apposite here. Indeed, even the facts of those cases are remarkably similar to the facts here involved.[9] The Metropolitan company was the owner of a 50-year lease of land belonging to the State. Metropolitan built improvements upon the land which immediately became the property of the State. The leasehold was heavily burdened by mortgages. In *Metropolitan Bldg. Co.* v. *King County*, 62 Wash. 409, 113 Pac. 1114, the court held that it was error to assess the

[9] All property of the State is tax-exempt. Section 84.36.010, Revised Code of Washington.

leasehold on the basis of the value of the improvements. In a later proceeding (72 Wash. 47, 129 Pac. 883), the court emphasized that a tax valuation must consider the burdens on a leasehold as well as its benefits and that mortgages must, therefore, be considered in computing the leasehold's value. While the *Metropolitan* cases involved lessees of tax-exempt property, the holding was not so limited and applied to all leaseholds.

Thus, had petitioners been lessees of property from *any* source other than the Federal Government,[7] the valuation of their property interest would have been based upon the market value of their leasehold, the computation of which would require a consideration of the amount of mortgages thereon. However, the Supreme Court of the State of Washington has held that the value of a leasehold of a Wherry Act project is measured by the full value of the improvements thereon, and the owner of the lease is taxed accordingly. *Moses Lake Homes* v. *Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069.[8] The court did not overrule the *Metropolitan* decisions in that case. To the contrary, the court clearly indicated that the decision in *Moses Lake Homes* was restricted to lessees of federal property. The reason for the court's extraordinary

[7] The Federal Government is not the only entity whose property is exempt from taxation in Washington. The list of exempt entities includes, *inter alia*, the State, cemeteries, churches, libraries, orphanages, nursing homes, hospitals, schools and colleges. See Chapter 84.36 of the Revised Code of Washington.

[8] *Moses Lake Homes* is the case that set aside the injunction which Moses Lake had obtained against the respondent.

treatment of the leaseholds in *Moses Lake Homes* is that it believed that the decision of this Court in *Offutt Housing Co.* v. *Sarpy County*, 351 U.S. 253, was dispositive of the question of the valuation of Wherry Act leasehold interests in all states. The court stated (51 Wash. 2d, pp. 286–288, 317 P. 2d, pp. 1070–1071):

> We think the case of *Offutt Housing Co.* v. *Sarpy County*, 351 U.S. 253, 76 S. Ct. 814, 819, 100 L. Ed. 1151, is controlling herein upon the question of the value of the respondent's leasehold interest.
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> * * * * *
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> We follow the *Offutt* case, and hold that the value of respondent's leasehold interest, at the nominal rent reserved, is the full value of the buildings and improvements. We do this because the supreme court of the United States is the final authority on the extent of the Federal government's waiver of immunity of Federal projects from state and local taxation, and because of the desirability of uniform taxing benefits among the several states where these housing projects are located.

The concurring opinion of Judge Donworth, in which Judge Foster and Chief Judge Hill concurred, stated (51 Wash. 2d, p. 288, 317 P. 2d, p. 1071):

> I am constrained to concur in the result of the foregoing opinion solely because I am bound by the majority opinion in *Offutt Housing Co.* v. *Sarpy County*, 351 U.S. 253, 76 S. Ct. 814, 100 L. Ed. 1151. The Wherry Act, as interpreted by that decision of the U.S. Supreme Court, is, by the provisions of Art. VI

of the United States Constitution, declared to be the supreme law of the land, and is binding upon state judges regardless of any state laws to the contrary. Hence, I concur in the reversal of the trial court's judgment.

The *Offutt* decision, however, does not require states to appraise Wherry Act leaseholds on the basis of the value of the improvements thereon. It holds that such procedure is not unconstitutional *per se, i.e.*, that states which have such a procedure may apply it to Wherry Act leaseholds. *Offutt* involved the law of Nebraska which employs that procedure for all leaseholds of tax-exempt property and, therefore, may validly apply it to leasehold of federal property.

However, assuming that the decision of the Supreme Court of Washington in *Moses Lake Homes* is the definitive statement of the state law as to the manner in which leaseholds of federal property are evaluated,[9] under that ruling, the value of the petitioners' leaseholds is measured by the full value of the improvements upon the property without any consideration to the large amounts of mortgages (more than $6,000,000) upon the leaseholds. Thus, the state tax on petitioners' leaseholds is much greater than it would be if they had leased tax-exempt property which was not owned by the Federal Government. In the latter case, their property would be

[9] While in *Moses Lake Homes* the court grounded its holding on a federal decision, its ruling nevertheless, determined the operation of the Washington taxing statute (7 Revised Code of Washington, Section 84.40.030) to lessees of federal property.

valued on the basis of the market value of their leaseholds which would allow for consideration of the large encumbrances upon that property.[10]

Nor can respondent find any comfort in its contention, made below, that the leaseholds of the petitioners may be treated differently from other leaseholds because the life of the lease will outlast the improvements. (R. 353–354.) There is no evidence in this record that the lease will outlast the improvements. To the contrary, the District Court, in its oral opinion, indicated that it was quite possible that the improvements would outlast the lease, particularly in view of the petitioners' obligation to repair and replace. (R. 318.) Moreover, even if the lease would outlast the improvements, that would, at the most, only demonstrate that the benefits of the leasehold should be measured by the full value of the improvements. It would not explain why the burdens of the leaseholds (*i.e.*, the mortgages) should have been excluded from consideration. It was primarily because of the exclusion of the petitioners' mortgages from the county's evaluation when they would have been considered in an evaluation of any other leasehold[11]

[10] It is noteworthy that, because of the county's failure to consider the amount of the mortgages on the leaseholds in evaluating the latter, the tax claims of the county against Larsonaire and Moses Lake for three to four years respectively are greater than the amount deposited for them by the United States as compensation for the entire balance of their lease (*i.e.*, about 70 years). See n. 1, p. 6, *supra*.

[11] In the State of Washington, a lessee is not treated as an owner of the leased property regardless of the length of his lease. Thus, a lessee of property for a term of 999 years was held to be a lessee rather than an owner. *State ex rel. Hellar* v.

that both courts below found the Washington tax to be discriminatory. The District Court found that (R. 155–156):

> The State of Washington by statute, Section 84.40.030 of the Revised Code of Washington, provides that taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash. The Supreme Court of the State of Washington has held with respect to leaseholds other than Wherry housing project leaseholds that in valuing the leasehold for taxation purposes it must be measured by its market value considered in the light of its burdens and benefits. *Metropolitan Building Co.* v. *King County,* 72 Wash., 47; 192 Pac., 887. *Metropolitan Building Co.* v. *King County,* 62 Wash., 409. *In re Metropolitan Building Co.*—144 Wash., 469; 258 Pac., 473. The State of Washington has followed a different method of evaluating Wherry housing projects for taxation purposes by decision of its Supreme Court. In the case of *Moses Lake Homes, Inc.* v. *Grant County*—151 Wash., Dec., 254, whereby the Supreme Court held that with respect to Wherry housing project leases the value of the leasehold interest in [sic] the full value of the buildings and improvements. By the laws of the State of Washington as declared by its Supreme Court, taxes and assessments on Wherry housing projects are thus

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Jackson, 82 Wash. 351. Consequently, in *Moses Lake Homes*, the Supreme Court of Washington expressly held that petitioners' interests in the Wherry Act projects were to be valued and taxed as leaseholds. In any event, lessees of federal property may not be taxed on property other than the leasehold. See *Offutt Housing Co.* v. *Sarpy County*, *supra*.

> levied upon a basis different and higher than the amount of taxes and assessments on other similar property of similar value.

The Court of Appeals affirmed this finding as follows (R. 354):

> The trial court's further finding that a different method was used in valuing the Wherry Act project leasehold here in question is also correct. Likewise to be sustained is the court's finding that the method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold.

B. THE WASHINGTON AD VALOREM TAXES ON THE LEASEHOLDS OF THE PETITIONERS ARE VOID

It is well settled that a state tax may not discriminate against the Federal Government or against those with whom it does business. *E.g., Phillips Co.* v. *Dumas School Distr.*, 361 U.S. 376; *United States* v. *City of Detroit*, 355 U.S. 466, 473; *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, rehearing denied, 357 U.S. 913; *Alabama* v. *King & Boozer*, 314 U.S. 1; *Graves* v. *N.Y. ex rel. O'Keefe*, 306 U.S. 466; *McCulloch* v. *Maryland*, 4 Wheat. 316. In *United States* v. *City of Detroit, supra*, at p. 473, this Court stated that:

> It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. * * *

In *Offutt Housing Co.* v. *Sarpy County, supra*, this Court held that the Wherry Act incorporated Section

6 of the Military Leasing Act of 1947 (61 Stat. 774) which provided that a lessee's interest made or created pursuant to that Act was subject to state or local taxation. However, that provision did not authorize the states to tax such lessees on a discriminatory basis. *Phillips Co.* v. *Dumas School Distr.*, 361 U.S. 376. In the latter case, this Court held that a discriminatory tax on a lease executed under the Military Leasing Act of 1947 was void.

After the *Offutt* decision, Congress amended the Wherry Act by Section 511 of the Housing Act of 1956. Section 511 also was not intended to waive the constitutional prohibition against discrimination. The legislative intent in enacting that section was to insure: [12]

> that States and communities, under adequate State tax statutes, would be able to obtain from Wherry Act projects taxes and assessments which, with payments and expenditures by the Federal Government for services in connection with the projects, would equal the taxes and assessments collected by the local taxing officials from other similar property.

Thus, the Act required that after June 15, 1956, state and local taxing authorities must reduce the normal tax load on Wherry Act leaseholds by an amount determined by the designee of the Secretary of Defense to be equal to certain payments made by the Federal Government concerning those projects which expense would normally be borne by the local gov-

[12] H. Rep. No. 2363, 84th Cong., 2d Sess., pp. 48–49 (3 U.S.C. Cong. & Adm. News (1956) 4555).

ernment. There is nothing in the Act or its history to indicate that states were thereby authorized to tax such leaseholds discriminatorily either before or after June 15, 1956. Discriminatory taxes were at all times prohibited by the Constitution. Section 511 provides a more stringent restriction on local taxing authorities than does the Constitution. The Constitution merely prohibits discriminatory taxes, but Section 511 sets a ceiling on local taxation that is considerably lower than the constitutional demands, *i.e.*, the tax may not be greater than an amount equal to the tax on similar property *less* a determined sum. It is inconceivable that Congress intended to waive the constitutional prohibition against tax discrimination in an Act designed to *increase* the restrictions on local taxation. For that reason, the holding of the court below that the taxes on the property of Moses Lake for the years 1955 through 1957 were valid because they would have been assessed prior to June 15, 1956, is untenable.[13] Irrespective of the applicability of Section 511, those taxes are invalid because they contravene the constitutional prohibition against discrimination.

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[13] The court also held that Moses Lake was precluded by the principle of *res judicata* from attacking the validity of the taxes against it for the years 1955 and 1956. We have taken no position on the merits of that issue nor on the question of whether it may properly be reviewed here in view of the terms of the question to which this Court limited certiorari. In any event, the holding of the court below that the tax on the leasehold of Moses Lake for the year 1957 is collectible in full cannot be sustained.

Indeed, this Court has recently passed upon the identical question presented here and held that a similarly discriminatory state tax was void. *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376. In *Phillips*, the State of Texas exacted a more burdensome tax on lessees of federal property than it did on lessees of other tax-exempt property. There was no justification for that discrimination. In holding the tax void, the Court stated (361 U.S. at pp. 385, 387):

> But where taxation of the private use of the Government's property is concerned, the Government's interests must be weighed in the balance. Accordingly, it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself. Compare *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 500.
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> * * * It follows that Article 5248, as applied in this case, discriminates unconstitutionally against the United States and its lessee. As we had occasion to state, quite recently, it still remains true, as it has from the time of *M'Culloch* v. *Maryland*, 4 Wheat. 316, that a state tax may not discriminate against the Government or those with whom it deals. See *United States* v. *City of Detroit*, *supra*, at 473. *Therefore, this tax may not be exacted.* [Emphasis added.]

The court below agreed with the District Court that the Washington taxes were discriminatory. However, the court further held that, under Section 511, that fault could be cured with respect to the taxes which it considered governed by Section 511 by re-

ducing the amount of the taxes to a sum that was not discriminatory. There is nothing in the history or language of Section 511 which would justify that interpretation. As noted above, Section 511 did not change the constitutional prohibition against discrimination. A discriminatory tax is void and "may not be exacted." *Phillips Co.* v. *Dumas School Distr.*, *supra*, 361 U.S. at p. 387; *Hanover Ins. Co.* v. *Harding*,[14] 272 U.S. 494; *Board of Directors* v. *Miller Pipe Line Co.*, 292 Fed. 474 (C.A. 8), certiorari denied, 263 U.S. 718, appeal dismissed, 267 U.S. 573. What the court below has done, in effect, is to decree a valid tax for the invalid tax which the State of Washington attempted to exact. That it can not do. The tax here involved was levied by the appropriate taxing officials of Grant County pursuant to a decision of the highest court of the State of Washington. In *Moses Lake Homes* v. *Grant County*, 51 Wash. 2d 285, 317 P. 2d 1069, the Supreme Court of the State

[14] In *Hanover*, the Court held that an Illinois tax was invalid because it discriminated against the petitioner and thereby denied petitioner the equal protection guaranteed to it by the Constitution. The court emphasized that it must accept the determination of the Illinois Supreme Court as to the application of the tax law to petitioner. On remand, the Illinois Supreme Court reversed its earlier determination and held that, under state law, the petitioner was not to be treated differently. (317 Ill. 366, 148 N.E. 23.) Had the Illinois Supreme Court not changed its interpretation, the tax would have been unconstitutional and no part of it could be collected. Of course, this Court cannot overrule the decision of the Washington Supreme Court but must accept that court's statement of the impact of the local tax on lessees of federal property. *E.g.*, *West* v. *A.T. & T. Co.*, 311 U.S. 223, 236.

of Washington held that the value of Wherry Act leaseholds for local tax purposes was measured by the full value of the improvements on the property. The court below may neither overrule that decision nor may it fashion, assess and levy a tax different from that imposed, assessed and levied by the local law and local officials. Cf., *United States* v. *New Orleans*, 98 U.S. 381, 392; *Hunt* v. *District of Columbia*, 108 F. 2d 10 (C.A. D.C.). It may only determine whether the tax levied by those officials is valid or invalid. If valid, the taxes should be collected. If invalid, the tax may not be exacted and no part of it may be collected. *E.g., Phillips Co.* v. *Dumas School Distr., supra.* And see *Hanover Ins. Co.* v. *Harding, supra;* and *Board of Directors* v. *Miller Pipe Line Co., supra.*

The court below agreed with the District Court that the assessment of petitioner's leasehold on the basis of the value of the improvements thereon was invalid. However, it held, in effect, that the District Court must determine the value of the leasehold and then compute the tax on that basis. In other words, the District Court is to reassess the leaseholds and levy a non-discriminatory tax thereon, applying a tax different from that declared by the highest state court.

It is difficult to find the source of the authority of the Court of Appeals to direct assessment and levy of local taxes, inasmuch as that power is normally vested only in the state legislatures. See *United States* v. *New Orleans*, 98 U.S. 381, 392. Moreover, the court below seeks to *reassess* the property, and

reassessments, not being favored by the law, can only be made when expressly authorized by statute. *E.g.*, *Tumulty* v. *District of Columbia*, 102 F. 2d 254 (C.A. D.C.). In Washington, the relevant statute provides that if "any tax or portion thereof levied against any property" is held void, "the county and state officers authorized to levy and assess taxes on the property shall", within one year after the final judgment declaring the tax or portion thereof to be void, relist and reassess the property. 7 Revised Statutes of Washington, Section 84.24.080.

Moreover, under the Washington Constitution, no person other than the appropriate county officials may reassess property for the purposes of computing the county *ad valorem* tax thereon. Art. 11, Section 12 of the Washington Constitution. See *State ex rel. State Tax Comm.* v. *Redd*, 166 Wash. 132, 6 P. 2d 619. In that case, a Washington statute authorizing the state tax commission to reassess property was held unconstitutional.[15]

While there apparently are no Washington cases discussing this question, there are several decisions of other state courts holding that, in situations such as this, a court may adjudge a tax valid or invalid but it may not reassess or revalue the property. *In re Blatt*, 41 N. Mex. 269, 287, 67 P. 2d 293, 304; *State* v. *Richardson*, 126 Tex. 11, 84 S.W. 2d 1076. Even assuming *arguendo* that the District Court was empowered to separate the part of the tax that was void from the part that was valid and enforce the latter,

[15] The court also held that in Washington the word "assessment" meant the valuation of property to be taxed.

it could do so only where nothing more than a mathematical calculation was involved; it could not substitute its discretion for that of the taxing officials of the county by determining the value of the leaseholds.[16] *State* v. *Richardson, supra.*

CONCLUSION

The Washington *ad valorem* tax on leaseholds, as here applied, unlawfully discriminates against the United States and its lessees. It is, therefore, repugnant to the Constitution of the United States and the taxes for none of the years involved, contrary to the judgment below, may be collected in full. If for any of the years a reassessment is appropriate, administering a different and non-discriminatory tax, it must be administered by the proper taxing officials of Grant County and not by a federal court. The judgment below should be reversed and the taxes levied for all years be declared void.

Respectfully submitted.

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[16] It is noteworthy that the Washington statute concerning reassessments (7 Revised Statutes of Washington, Section 84.24.080) provides that, after a court has adjudged a tax void in whole or in part, the *county officials* shall reassess the property. Thus, it could appear that Washington intended to leave that function to the proper taxing officials and not to the courts.

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